UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARIANNE GATES,

Plaintiff,

v.

UNITEDHEALTH GROUP, INC., et al.,

Defendants.

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New York, N.Y.

11 Civ. 3487(KBF)

September 26, 2014
2:45 p.m.

Before:

HON. KATHERINE B. FORREST,

District Judge

APPEARANCES

KELLER ROHRBACK, LLP
Attorneys for Plaintiff
BY: DAVID S. PREMINGER

WEIL, GOTSHAL & MANGES, LLP
Attorneys for Defendant Unitedhealth Group, et al
BY: NICHOLAS J. PAPPAS
DANIEL J. VENDITTI
CELINE J. CHAN

ORRICK, HERRINGTON & SUTCLIFFE, LLP
Attorneys for Defendant AllianceBernstein
BY: JOHN D. GIANSELLO, III

(Case called)

MR. PREMINGER: David Preminger, Keller Rohrback, for plaintiff.

THE COURT: Good afternoon, Mr. Preminger.

MR. PAPPAS: Nicholas Pappas, of Weil, Gotshal & Manges, for United Healthcare Insurance Company, joined today by Dan Venditti and Celine Chan.

THE COURT: Good afternoon, everyone.

MR. GIANSELLO: John Giansello, of Orrick Herrington & Sutcliffe, LLP, for the AllianceBernstein defendants.

THE COURT: All right. Good afternoon.

We are here for oral argument on the pending motion. I have been through all the papers again and I have been several times now back through my initial decision, and by that, talking about the decision that was appealed to the Second Circuit and also the Second Circuit's decision, and I am going to turn the floor over to you folks. We have until 4:00, and let me just tell you how I want to -- you think that's too long or too short, Mr. Giansello?

MR. GIANSELLO: I am just looking at the clock.

THE COURT: I want to focus you folks first and I want to do this in a way that does not suggest to you, if you go back and read the tea leaves, which way I am coming out on the ambiguity issue, what I will call the ambiguity issue. But I

would like to find out what would happen to the claims and what is left if I decide the language is unambiguous and that, therefore, there is a claim for benefits.

I understand how you folks have played out the various scenarios and by "you folks," I am talking about the defendants, in terms of all of the claims which fall by the wayside if the court determined that the language is ambiguous and therefore we go into the arbitrary and capricious standard, and therefore if that high standard can't be met, various claims go away. But I need to have in my mind both aspects of the decision tree.

What's left, what do you folks believe at least arguably is left? Mr. Preminger, what do you think is left if the court decides that the language is, again, unambiguous and is required to essentially read the language as Mr. Preminger has suggested? That is not to say that that's what I am going to do, but that's the point which I am most confused by, and I like to have everybody's arguments clearly in mind as I embark on trying to write something.

So, with that said, I actually think the place to start probably is -- doesn't matter, Mr. Giansello, Mr. Pappas, who starts -- is really not focusing first on the ambiguous/unambiguous issue. That may be where you folks have spent the most time preparing, but it is the issue I also understand the best in terms of I understand how the scenarios

play out and how the benefits get calculated and all of that.

MR. PAPPAS: Your Honor, would you like me to go to the podium?

THE COURT: That would be helpful. Then we can get a clear sound, the court reporter can get a clear sound. You can move the podium back if it is too far up. It's up to you.

MR. PAPPAS: Sure.

If I understand the court's question, the court in essence would resolve the claim for benefits in Count One in favor of the plaintiff and what would that do to Counts Two to the end?

THE COURT: A little bit different because there are other counts. It actually flows through a number of the counts. What if the court -- that's why I call it sort of the ambiguity/unambiguity. What if I were to determine that the UHIC and AB, for the defendants, using your initials, that you folks had used interpretation that you shouldn't have used because the language in fact is unambiguous and dictated the result that Mr. Preminger is suggesting insofar as the calculation of benefits is concerned?

MR. PAPPAS: Right. I understand that to be the (a)(1)(b) claim which is in Count One. You are right, your Honor, that resolution of the (a)(1)(b) claim in plaintiff's favor would affect the others. So if I could take them count by count, I think that at least that would be how I would sort

through the analysis.

Count Two is asserted against my client, United Healthcare Insurance Company. If the court were to find that a claim for benefits were properly stated in Count One, we would still argue that, therefore, there should be no claim for injunctive relief in Count Two, which is really enforcing plaintiff's theory of how the plan should be interpreted. There should be no such claim because, in effect, as we had argued in our papers, you can't have it both ways. To the extent that, under *Varity* v. *Howe*, there is an adequate alternative remedy available under ERISA section 502, the plaintiff must avail herself of that adequate alternative remedy before resorting to the catch-all provision of 502(a)(3), which allows the court to provide appropriate equitable relief, and the Supreme Court has made clear it is not appropriate equitable relief if alternative relief is available under 502(a)(1)(b).

THE COURT: Let me ask you, in that regard, there seems to be some suggestion of it in the papers, but you folks didn't brief the injunctive issue, well, you did a little bit in terms of the switchover to the indemnity plan, but you didn't really brief it so much as there is no chance for repetition. In other words, one of the primary requirements for an injunctive claim is that there is some opportunity for this to go on, that the harm will continue in some way. So in

addition to the fact that there may be adequate alternative relief, there is also a separate question as to whether or not you can get an injunction if the conduct can't continue.

MR. PAPPAS: And I will let Mr. Giansello handle that because he, I think, argued that in his papers, which is based on the fact that plaintiff is no longer a participant in the copay plan, she is now a participant in the indemnity plan, and therefore no injunction this court could enter on the copay plan could affect Ms. Gates.

The other approach I was taking, and I believe we briefed this in our papers, your Honor, 502(a)(1)(b) is not purely a claim for breach of contract, allowing the court to award the benefits that would have been paid absent the breach. It also provides for enforcement of Ms. Gates' rights under the plan and it provides for an action for clarification of future rights under the plan, identical to the very relief the plaintiff is seeking in her injunction. I enjoin United Healthcare from interpreting the copay plan to read the way United Healthcare has read it. I want you to read it the other way. That's exactly the same relief that a declaration under (a)(1)(b) would read. Therefore, there is no such claim that can be asserted under (a)(3). As this court has previously ruled, and no one disputes, the only proper defendant on the (a)(1)(b) claim is the plan. Your Honor dismissed that claim against United Healthcare long ago. So that would result in a

dismissal of Count Two, as we have already briefed that, your Honor.

THE COURT: So, in other words, Count Two goes away in your view either way.

MR. PAPPAS: Count Two goes away. It is improperly pled. It goes away either way. Indeed, your Honor, as we said in our reply brief, we believe plaintiff really doesn't dispute that point because your Honor has already ruled, as I am describing right now, in the court's July 2012 order, when the court dismissed what the court described as "the equitable portion of the claim under (a)(3) against United Healthcare.

So the plaintiff has taken the position, well, no, not really. This is a proposed class action, and that's different. There are a number of arguments why plaintiff says it is different today. We, of course, disagree with that because before the court gets to class certification issues under Rule 23, the court must first address the motion to dismiss. The motion to dismiss is based precisely on this duplicativeness issue and the *Varity* issue and the mere -- so before you get to whether there is a class action, Mrs. Gates has to have a claim on her own. So if Mrs. Gates in fact concedes, which we think she did, that she has no claim under (a)(3), she does not seek reversal of your earlier ruling, and did not appeal that earlier ruling, so it is law of the case now. There is no claim against United, there should be no claim against United,

under (a)(3). The court merely needs to reaffirm what the court has said in the past and what we have again briefed.

The other reason why plaintiff says that the fact that she is seeking class certification makes a difference here is again under *NECA*, the Second Circuit's ruling in *NECA*, that she has "class standing." And she points out that the Second Circuit has directed your Honor to consider the *NECA* issue as applied to this issue, and we are happy for the court to consider it. We think the court has already considered the issue and properly so. *NECA* does not overturn the obvious statement that the plaintiff has to have a claim in her own right. The plaintiff in *NECA* had a claim under the securities laws in its own right. The only issue in *NECA* was composition of the class. We are not yet discussing composition of the class. The composition of the class cannot give Ms. Gates a claim. Either she has it in her own right or she doesn't. If she doesn't, we never get to this question of class composition. *NECA* doesn't really address the issue and take the case as far as the plaintiffs suggest.

THE COURT: Let me break that down into a couple of pieces because I am very familiar with the *NECA* case and some other cases I have dealt with that. But as I see it, there are a couple of different pieces to it. One is, if we were at a stage where we were determining for class certification purposes whether Ms. Gates could represent some variety of

plaintiffs who might have claims that she doesn't have, that's one scenario, but that's different from a scenario where it is an up or down on a 12(b)(6) or a rule 56 as to a particular plaintiff when there hasn't been a class certified yet. If that plaintiff doesn't have a claim, if essentially there is a liability determination against her, then that plaintiff is gone. And then there is a complicated sometimes and sometimes not very complicated relation-back issue if there is a substitute. And that depends on a lot of things. But essentially if she is gone, she is gone. I don't think she can -- and Mr. Preminger can address this -- stick around if she doesn't have a claim just to hang out for somebody else. There are a variety of reasons for that, one of which has to do with typicality, it has to do with her incentives to adequately pursue the interests of the class, etc., etc. You don't need to address that anymore. I was just responding. But Mr. Preminger can see where my head is with the *NECA* pieces, and that has to do with the procedural posture really of what comes first.

MR. PAPPAS: Your Honor has got it exactly, and I can move on.

Your Honor, I will skip Count Three, which is asserted against AllianceBernstein. Mr. Giansello will address that.

Count Four, assuming --

THE COURT: Let me make sure I understand clearly your

one line sentences on Count Two. So on Count Two your argument is, first of all, if Ms. Gates has a claim for benefits or had a claim for benefits, that's preclusive of a claim for injunctive relief because she has got an adequate remedy already --

MR. PAPPAS: Or declaratory relief.

THE COURT: Or some other relief.

And your second point, well, my second point is that if it is not a continuing violation, then there may not be a basis for prospective injunctive relief in any event.

And then the third point is the *NECA* point.

MR. PAPPAS: That is right, your Honor. I think the other point that plaintiff made was because she is a class representative that, therefore, even though she doesn't have a claim, she can somehow continue to assert her claim.

THE COURT: I think that's the *NECA*.

MR. PAPPAS: It may be related to the *NECA* point. It was argued in a couple of different ways, but it does come back to the *NECA* point.

THE COURT: Now you can go on to Count Four. I wanted to make sure you had your arguments.

MR. PAPPAS: Right.

So Count Four, your Honor, is the claim where plaintiff seeks equitable relief pursuant to ERISA section 502(a)(2) and 502(a)(3) premised upon UHIC's failure to comply

with ERISA's claim procedure requirements. So putting aside whether she is entitled to benefits or not, if she is not entitled to benefits, that claim goes away. I think your Honor ruled that way once before. Your Honor's hypothetical is if she is entitled to benefits, does she also have the right to bring a claim pursuant to 502(a)(2) or 502(a)(3) relating to the claim procedure violations that the plaintiff has raised?

Your Honor, on that point, in our motion to dismiss we have asserted a number of different grounds for dismissal. The primary one is that -- and I am going to break it into 502(a)(2) and 502(a)(3) because they are a little different. 502(a)(2) creates a cause of action for remedying a violation of 409 of ERISA, and 409 of ERISA creates liability for the fiduciary in the personal capacity of the fiduciary where there is a loss, misuse, or mismanagement of plan assets.

The reason why that is critically important here is, even if benefits are due, certainly if benefits are not due, there is no allegation in the complaint -- and plaintiff has resisted any effort to identify what are the plan assets that have been lost, misused, or mismanaged. There is not a word about that in the complaint. And there is a reason for that. There is no reason why Ms. Gates would have any concern that plan assets have been lost, misused, or mismanaged. The plaintiff's only response to the argument is, well, 409 also provides a cause of action for, quote, appropriate equitable

relief. Therefore, she says, she can bring in any breach of fiduciary duty even if it is unrelated to loss, misuse, or mismanagement of plan assets.

We have cited cases to your Honor stating the opposite, and in particular we refer the court to -- if I can just find it.

THE COURT: I remember that section of your papers.

MR. PAPPAS: So there is case law, your Honor, making that very clear. The plaintiff cites three cases which we have distinguished because they all relate to, in some form or fashion, some connection to identified plan assets which plaintiff has not applied to herself. So, therefore, the absence of a loss, misuse, or mismanagement the plan assets means even if Ms. Gates is entitled to benefits under the plan, she certainly can't get a 502(a)(2), any 502(a)(2) relief.

502(a)(3), your Honor, the plaintiff has conceded that cause of action is coextensive with the 502(a)(2) claim. It is merely a, quote, fallback to her 502(a)(2) claim. I think acknowledging that if she has a 502(a)(2) claim, that she cannot bring a 502(a)(3) claim. That doesn't mean a meritorious 502(a)(2) claim. That means any 502(a)(2) claim.

So, for example, 409 of ERISA actionable under (a)(2) provides that the court can order removal of the fiduciary. Well, you can't get that under (a)(3). We have cited the *Wise* case for that proposition. It is available under (a)(2). You

can't get it under (a)(3).

In the same manner, 409 of ERISA provides an action for restoration of lost profits. If she is seeking restoration of lost profits under (a)(3), you can't have it under (a)(3) because it is available under (a)(2).

The final piece of the (a)(3) claim is appropriate equitable relief. She is seeking appropriate equitable relief under (a)(2). It is expressly available under (a)(2). You can't get it under (a)(3).

So under the principles of *Varity* v. *Howe*, your Honor, the Supreme Court has told us in construing the scope of available relief under (a)(3) the court has to ascertain, first, is there any alternative available remedy. If there is, there is no appropriate equitable relief under (a)(3).

THE COURT: Let me ask you, and this is something that may be painfully obvious to you folks who practice in this area all the time, but as I understand the way ERISA works -- and you can disabuse me of this if I have gotten it terribly wrong -- you have got to come up with a violation first, and that would be the article 4 violation, the 409 violation here on Count Four. Only if you come up with an article 4 or some other violation do you get to the relief under 502(a)(2) or (3).

So if it turns out that 409 is in fact not a viable claim because there is no loss of plan assets, does it matter

whether we are talking about 502(a)(3) or 502(a)(2) because you don't have any remedy. There is no trigger to the remedy.

MR. PAPPAS: Your Honor, I agree with you. I think at the end of the day, because there is an available 409, 502(a)(2) claim, there can be no 502(a)(3) claim. I think the other way plaintiff --

THE COURT: What's the available 409 claim?

MR. PAPPAS: Well, the plaintiff has asserted -- Count Four asserts relief under 409. It is available. It doesn't mean it is meritorious. It is available. For the reasons we stated, because she hasn't alleged loss, misuse, or mismanagement of plan assets, the 502(a)(2) claim should be dismissed for that reason.

THE COURT: In fact there is no -- when we say 502(a)(2), we are talk about the relief available for a 409.

MR. PAPPAS: Correct.

THE COURT: Okay.

MR. PAPPAS: Correct.

THE COURT: So the way I think about it, which may be backwards to the way you think about it, is is there a 409 breach of fiduciary duty violation as set forth in 409? And then if there is, then I go to the type of relief which could be imposed for such violation. And then what your point is, I think, is if there is a 409, then 502(a)(2) is all she needs and all she gets. So I could dismiss the 502(a)(3) under an

"even assuming" argument. Even assuming a 409 violation, 502(a)(2) would be enough. But then you back into, I think your argument is, but she doesn't even get to 502(a)(2) because there is no 409.

MR. PAPPAS: Correct. And there is another theory she has asserted. I think your Honor got it so far.

The other theory she is asserting is under 404 of ERISA. 404 of ERISA state the general fiduciary duty rules that applies to all fiduciaries. That doesn't provide remedies or anything. It just provides what the are the duties.

One of the duties of the fiduciary is to comply with the terms of the plan insofar as the plan is consistent with ERISA. And the plaintiff says the AllianceBernstein plan contains this procedure that is no different from the claims procedure that is set forth in the claims procedure regulations. And your Honor has already dismissed the claim under the claim procedure regulations, as your Honor recalls, under 503 of ERISA, because the 503 claim can be asserted only against the plan, not against the claims administrator. So your Honor has dismissed the 503 statutory claim, which is the plaintiff says is actionable under 502(a)(3) and she has asserted that claim against AllianceBernstein.

Against United she says, well, because you have to comply with the terms of the plan, therefore, that's a fiduciary duty to comply with the terms of the plan. United is

not complying with the terms of the plan, therefore, United has breached its fiduciary duty under 404(a). That is actionable under 409 and 502(a)(2) and 502(a)(3).

THE COURT: Let me just have you pause for a moment.

Let's assume for the moment that the court found that there was a breach of fiduciary duty in failing to pay the claimed benefit, that Mrs. Gates' calculation was appropriate, that UHIC should have utilized the methodology that she poses. At that point what would be the appropriate relief? If I found it was a 404(a) claim based upon a benefits finding, so to speak, what in your view is the appropriate relief at this point, assuming is it surcharge, is it --

MR. PAPPAS: Well, under 502(a)(2)(b) if the court found benefits were due, the court would simply enter judgment in the amount due. It would be, Plan, you must pay Ms. Gates $300 or whatever it is, right? I think that's her relief. To the extent that she certifies a class, she seeks to certify a class under her plan, presumably the court might have to enter into class proceedings to address whether or not this applies to other people, and then potentially some fund would be created to distribute additional benefits if due to anyone else similarly situated to Ms. Gates. That would be self-executing, your Honor.

And this goes back to what we talked about earlier. No further injunction is appropriate. Your Honor would

presumably be able to declare the rights of Ms. Gates and the class under the plan. You would construe the plan. Your opinion would be whatever it is. That would be the ruling of the court at that point.

THE COURT: One of the arguments that the plaintiff makes in her response to that is it can't be that 502(a)(2) doesn't get you anything. Because part of the argument is if she has brought her lawsuit and the court were to provide her with relief, then there is no other review. Any further review can't get her anything else as I understand it. Right? And then their argument is, well, that can't be so; because if that is so, then 502(a)(3) doesn't really get her anything.

MR. PAPPAS: It may not get Ms. Gates anything, that's absolute correct, your Honor. That's part and parcel of the claim that she is asserting. She is asserting a claim for benefits. In its essence her claim is one for benefits.

The Supreme Court in the *Varity* case came up with a very unusual set of circumstances where a 502(a)(3) claim was found appropriate. In *Varity* v. *Howe*, the plan ceased to exist. The plaintiffs were duped into taking employment with another company with lesser benefits. That other company declared bankruptcy so, in essence, the benefits were lost as a result of this inequitable conduct. Well, they couldn't bring a claim for benefits because the plan no longer existed. There was an interference by the deemed fiduciary in that case with

their benefits rights based on this fraudulent misrepresentation, and the Supreme Court said, well, in that case there could be a 502(a)(3) claim for appropriate equitable relief. The alternative (a)(1)(b) claim was not in existence at that point, and therefore the (a)(3) claim was found to be satisfactory.

THE COURT: What kind of equitable relief would even conceivably work?

MR. PAPPAS: In that case?

THE COURT: Yes.

MR. PAPPAS: I actually read the case on remand, your Honor. The plaintiffs sought and were given equitable restitution which, in essence, are the benefits they would have had if they had not been duped into going into this other company which then declared bankruptcy. If they weren't duped they would have had some additional benefits, and therefore there was equitable restitution.

There are all kinds of issues around whether equitable restitution is actually appropriately available under (a)(3). The court mentioned surcharge, and this is an area of an enormous amount of litigation, you know, what is appropriate relief under 502(a)(3). It is litigated all the time. In every case the defendant is going to argue what I am arguing, that your remedy is somewhere else. You have to get that first. If you don't get it, then you can't go back to (a)(3).

(A)(3) is not just a free-for-all. Otherwise you would undermine all of the other very complex and detailed provision of ERISA.

THE COURT: It sounds like what you are saying is 502(a)(3) is almost never available, that you would almost always, under your reasoning, I think, have some other remedy. You would only get to a 502(a)(3) under a *Varity* type situation.

MR. PAPPAS: I have a hard time with "never," your Honor, but I have to say the (a)(3) claims are dismissed a lot. In the research we have done, certainly unsuccessful (a)(3) claims are far more plentiful than successful ones. And the reason is ERISA is set up to deliver benefits, and the (a)(1)(b) claim is really the workhorse for ERISA. Get your benefits. If you have gotten your benefits, everything should fall away.

And the policy behind that, which of course is behind all of this, is to have administration of employee benefit plans without all this collateral litigation. Congress really did intend to reduce and limit litigation, streamline litigation, make plans self-executing such that you didn't need to resort to the courts every time there is a benefit dispute. The Congress really wanted these things resolved at the administrative level, and that's why you have all of this regime built up around (a)(1)(b).

Your Honor, going back to the point that I was making, the plaintiff's theory for breach of fiduciary duty is you violated the plan, therefore -- the claim for breach of fiduciary duty, therefore the Count Four claim survives. For the reasons we said, we have gone through the loss, misuse, or mismanagement of plan assets, but we also in our papers described some other reasons why the court should not recognize that type of breach of fiduciary duty claim. And the reason is this goes back to, again, the principle in *Varity v. Howe*. Congress was very specific in enacting 503 of ERISA. 503 of ERISA is the provision where plans are required to have claims procedures enter full and fair review of claims. And under that provision, the Department of Labor is authorized to issue regulations, which it has, and so there is a whole regime around claim procedures and claim procedure regulations.

Where you have a diligent and appropriate plan which not only embraces compliance with the regulations but brings it into the plan, the plaintiff's theory would be that by in essence restating its legal requirements in the plan, that somehow they have now expanded, the plan has expanded its liability and, not only that, made the fiduciary responsible, on pain of a breach of fiduciary duty, to be sued in federal court.

We have argued in our papers, your Honor, that that is inconsistent with the *Varity* principal itself. There is an

alternative relief available under 503 for full and fair review, where a claim procedure is deemed inappropriate. And the plaintiff has brought that claim in this case, they brought -- the court has ruled she can't bring it against United. She has brought it against the plan. And the plan has argued, and Mr. Giansello will expand on this, that the only relief available for that is either deemed exhaustion -- which the court has already given to the plaintiff in your earlier ruling -- or remand. So if you didn't get the procedure, you intended to or you expected to get from your plan, fiduciary, go back and get it.

And the Second Circuit has been very clear about that in the -- I believe it was the *Nechis* case where the Second Circuit said the ordinary result there for violating claim procedure violations is remand. Well, the same should exist here. If she is going to sue based on that under 502(a)(3), incorporating the 404 and the plan requirements, the same defenses should exist as exist under 503. There shouldn't be a claim against the fiduciary. And if she gets any relief, it should be remand to the plan to get her procedures. The notion that the court should sit in judgment and then enjoin some procedure seems contrary to the structure of ERISA, and certainly there is no precedent for the type of relief that the plaintiff is seeking here.

THE COURT: Should I hear from Mr. Giansello and then

have you add anything else in or is there something else that you want to add?

MR. PAPPAS: Sure, your Honor. I did have quite a bit to say about the summary judgment. But if the court wants to defer that --

THE COURT: It is more that sometimes I don't even have oral argument. It is not that I am not paying attention to the various arguments, but these are where I need a little bit more assistance.

MR. PAPPAS: Understood, your Honor. Whatever is good for your Honor is good for me.

THE COURT: Let me hear from Mr. Giansello in terms of the same sort of thing, and so your papers focused so much on the language of the plan and the calculation, but that actually is, as I have said, the thing I need to hear least about, but you have got claims, other claims. You have got three, four and five.

MR. PAPPAS: Your Honor, one correction for the record. My associate tells me that I should have said *Krauss v. Oxford*, not *Nechis v. Oxford*, for the fact that remand is normally the appropriate remedy. So it is *Krauss*, not *Nechis*.

THE COURT: Very good. Which one of you was that?

MR. VENDITTI: Team effort; both of us.

MR. GIANSELLO: Where to start? This is like a Rubik's Cube or something that sort of keeps turning over on

itself.

THE COURT: That's the way I have been thinking about it, like a Rubik's Cube.

MR. GIANSELLO: I think to go back to the court -- well, first of all, I want to second what Mr. Pappas has said about the impact of *Varity*, and I want to cite the court specifically to page 512 of the Supreme Court's decision, where the court says, "And, as the court pointed out in *Russell*, 473 U.S. at 144, ERISA specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims, one that is outside the framework of the second subsection" -- which means of 502(a), that is, 502(a)(2) -- "and cross references section 409" -- that is the other subsection which references section 409 -- "and one that runs directly to the injured beneficiary" -- and that is 502(a)(1)(b).

That is a very broad reading by the court of some language in *Russell*, at 144, which said "Only, significantly, the statutory provision, the one that explicitly authorizes a beneficiary to bring an action to enforce his rights under the plan" -- which is 502(a)(1)(B) -- "says nothing about the recovery of extracontractual damages."

So it appears that there are fiduciary duties and there are fiduciary duties. Not every fiduciary duty, in this very broad language of the Supreme Court, is a fiduciary duty

that is actionable under section 409 because it is a violation of the fiduciary duty set forth in section 404, such as to provide relief under 502(a)(2).

But the relief, then, is not based on the rest of *Varity*, as Mr. Pappas has argued, 502(a)(3). It is specifically and directly under the language of *Varity* under 502(a)(1)(B), which is the claim for damages. So I think that's where you end up coming back. And the other sections of 502 are superfluous based on that authority.

Now, to go back to the court's original question, what happens if I decide the first question against the plan, the first issue against the plan, and determine that the plan is unambiguous and it must be construed the way Mr. Preminger argues. Well, then I think, as Mr. Pappas says, we get into -- and as you have recognized, we get into the question of whether she can, based on pretty clear Supreme Court jurisprudence, make out a claim for equitable relief, for injunctive relief.

And I think under *Lyons* it is pretty clear that she can't. In that case, what you had was a police brutality case in which the plaintiff was suing both for damages under Section 1983 and for an injunction to prevent the city and the police department from continuing the practice. The court said, well, it is much too speculative that this plaintiff will ever be subjected to this conduct again. He has his remedy for damages, and that's it.

It seems to me that is the analog here. She is out of the copay plan. She cannot be harmed by any future application of the copay plan under any circumstances, so her remedy is damages, and that decision has whatever impact and whatever effect it has.

Then we get to the question of whether she can represent any class. And you have already recognized the difficulties and problems that inhere in that question.

Then it seems to her, the other thing you have to do is grapple with this issue that is intertwined with *Varity* and I think probably confront directly the question of whether a violation of section 503, the claims procedure, her claims procedure arguments, are the kind of breach of fiduciary duty that is independent of her claim for benefits, and we have cited cases to that effect.

THE COURT: This is now, you are talking about the seventh -- no, that's the third claim. Give me the count.

MR. GIANSELLO: It is the third, fourth, and fifth. The sixth and seventh claims are gone. She has abandoned the sixth, and the seventh has been determined by the Second Circuit, your decision on that one has been upheld by the Second Circuit.

THE COURT: All right.

MR. GIANSELLO: But it seems to me Counts Three, Four -- I believe it is Three, Four, and Five all depend

ultimately on whether a deficiency with respect to section 503, the notice and claims procedure requirements, both of that section and the regulations under it, amount to the kind of breach of a fiduciary obligation that implicates sections 404, 409, and 502(a)(2).

The other thing I want to say is with respect to I believe it is the third claim, the one that is alleged directly against the plans for violation of Section 503, which she now argues is not *vis-à-vis* the plans claim for breach of fiduciary duty, but a direct action against the plans, even though, clearly, if you look at the fourth claim, it is bottomed on a claimed breach of duty by UHIC. That whole argument that she has a direct action is based on a reading of some language by the Second Circuit that I think takes that language much farther than the Second Circuit intended it to go. I think that the Circuit was very careful with the precise language it used on page 8 of its decision where it says, "There is no question that Gates has a statutory right to a full and fair review of her claims and that violations of that right are made expressly actionable by the applicable regulations. Gates has submitted evidence related to the processing of her claims that, when taken as true, establishes a violation of her rights sufficient to establish standing. Defendant's other arguments for dismissing Gates' procedural claims concern whether or not she may properly bring certain claims on the basis of a breach

of fiduciary duty and whether she is entitled to certain forms of relief."

So the circuit doesn't answer those questions. It does nothing. It asks you to take another look at them, your Honor. But it does nothing to upset the line of authority that the remedy for a violation of section 503 and the associated regulations is either deemed exhausted, which she has, or remand, and that is it. She goes directly to a claim for benefits under 502(a)(1)(b), and I think that's where the heart of this action is. So I think it ultimately comes back to -- we ultimately come back to "go." Whether she gets $200 or not is another question.

THE COURT: Okay. How about the seventh claim?

MR. GIANSELLO: The seventh claim you dismissed because --

THE COURT: Not the seventh claim. Let me go back to that actually. There is a debate between you folks about whether or not there is anything else that can happen with the switchover to her in the indemnity plan.

MR. GIANSELLO: Nothing can happen to her in the future, and I think there is a case, I have it here, she argues that she is still a participant in the copay plan based on *Firestone*. I had asked the court to take a look at *Flannigan v. General Electric Company*, 93 F.Supp.2d 236 at 259, from the District of Connecticut in 2000, where the District of

Connecticut points out that *Firestone* addressed only the question of what showing a claimant must make in order to be entitled to receive information under Section 1024(b)(4).

It is, I think, insofar as its discussion of who is a participant, when we are talking about a former employee, limited pretty much to its facts, and the broad implication of participant status that Mr. Preminger wants to argue from Firestone I think is not supported by the case itself. Clearly to the extent she has residual claims that are vested for benefits under the copay plan, she has got a claim and the court has to decide the validity of that claim. But there is nothing more in anybody's likelihood that can happen to her by reason of any administration of a copay plan. She is in the indemnity plan now because different language -- frankly, I think a decision by the court supporting her view of unambiguous, too allowable expenses under the copay plan is dangerous, not only for her, but also for the participants and beneficiaries in the indemnity plan, but we don't need to get there. The only reason I say that is because if the court were to reach a decision that her view of the copay plan's coordination of benefits provisions is mandated by the language of the plan, that has potentially some effect down the road, even if a class is not certified.

THE COURT: You may come back to that.

Let me hear from Mr. Preminger. Is there anything

else you wanted to add on this?

MR. GIANSELLO: No, thank you.

THE COURT: Let me hear from Mr. Preminger on this, and then let's circle back to that last point.

MR. PREMINGER: Thank you, your Honor.

At the outset, I think there is some confusion -- and I think the defendants have done their best to create it -- between claims for benefits and procedural claims that the plaintiff has made.

Her claim for benefits is based on her reading that the plan is unambiguous and that therefore she is entitled to benefits under the unambiguous plan terms.

THE COURT: In which count is she seeking --

MR. PREMINGER: That's Count One, where she claims benefits under 502(a)(1)(b). She also seeks benefits for anybody else in the plan in that claim who might have been harmed by the same interpretation of the provision.

THE COURT: Is her claim under Count One live or has that been dismissed?

MR. PREMINGER: No, Counts One through Five are all active. Only Six we dismissed. Seven, the court affirmed your dismissal, the Second Circuit affirmed your dismissal. The first five are all still before this court.

In that claim, the plaintiff also seeks injunctive relief precluding the plan from continuing to interpret it in

the fashion that it has. There is no doubt that such an injunction is available.

The second claim, the plaintiff seeks to sue on behalf of participants in other plans for which United is the claims administrator and which also estimate Medicare benefits when the plan does not provide for estimation. That gets us into the question which your Honor raised in the first motion to dismiss and which the Second Circuit said should be reconsidered in light of *NECA*. That is a class action issue. It need not be addressed right now.

THE COURT: Right. But your view is that the broadest claim that you are bringing is the claim for injunctive relief against UHIC, an administrator of all kinds of other plans where they use a similar estimating methodology, and that is part of Count One for you.

MR. PREMINGER: No, that is Count Two.

THE COURT: Count Two.

MR. PREMINGER: Count One is limited to the AB plan.

THE COURT: So Count Two is your big, broad --

MR. PREMINGER: That's correct.

THE COURT: -- claim.

MR. PREMINGER: That's correct.

THE COURT: And that is the injunction only for the estimating methodology as to all kinds of folks.

MR. PREMINGER: That's correct.

THE COURT: And are you seeking the injunctive relief in Count Two also as to the UHIC plan?

MR. PREMINGER: It is as to all plans. It depends on, I suppose, how things go in terms of getting classes certified and whether or not a subclass is necessary.

THE COURT: If she were found not to have the ability to bring a claim for injunctive relief under Count Two, if Count Two only seeks injunctive relief, then Count Two would be dismissed as to her and then there would be a separate issue that you would argue under *NECA* where she could still have some sort of representational ability and we would fight that out then.

MR. PREMINGER: Yes. Well, let me point out procedurally exactly how this happened.

The first complaint sought monetary relief for all of the participant of these other plans. That was what your Honor said she could not do.

So in the amended complaint, the second amended complaint, we limited to injunctive relief because you said we did not have standing with respect to the monetary relief. We limited it to injunctive relief because the standing rules are different. For monetary relief, she would have had a personal monetary loss. You ruled that wasn't appropriate in that case, in the claim we made, but. For a statutory violation all you really need is to show that the plaintiff has -- that there is

some sort of statutory right which has been denied and you have a statutory right to have the unambiguous plan provisions applied according to their terms.

Depending upon what your Honor does here, we may in fact seek to amend again simply because based on the Second Circuit's opinion, which sought to have your Honor reevaluate the initial decision based on *NECA*, we may want to seek monetary relief in the second claim again.

THE COURT: They have actually had some class statements since *NECA* that have further refined it.

MR. PREMINGER: Well, no, we will take a look at all of that --

THE COURT: It's more consistent with me than not.

MR. PREMINGER: Your Honor, we are not seeking to amend now. Obviously what we are going to do is going to depend on what your Honor does with respect to all of these motions.

THE COURT: So how about Count Three?

MR. PREMINGER: I am not finished with Count Two yet, if I may.

THE COURT: All right.

MR. PREMINGER: One, with respect to *Varity*, the principal point in *Varity* was there shouldn't be a right without a remedy. So if in fact there has been a problem with the way in which United has been interpreting these plans,

injunctive relief should be available. Under what section, you know, the case law I think is pretty clear that if someone has stated a claim but they state the wrong section under which they are entitled to bring that claim, the court can ignore that. We do not concede that we have stated the wrong section. If the court finds it, though, we have nonetheless stated a claim. Mr. Pappas has stated it states a claim under 502(a)(1)(B) not under (a)(3). We still stated a claim, just we have been in error with respect to the (a)(3).

I would point out that 502(a)(1)(B) says that a participant may bring a claim for benefits under his plan, may seek clarification of his rights under his plan, not anybody else's plan. So whether or not that relief is available (a)(1)(B) is not necessarily -- it is not necessarily available under (a)(1)(B). But if it is, we have nonetheless stated a claim.

Now, you wanted to go on to which claim at this point?

THE COURT: I just want to make sure that I understand this issue that we have been talking about in terms of if she has a claim for benefits/if I find the language is as you suggested it should be, what that does to positions of various folks on these claims.

MR. PREMINGER: If in fact you decide that our reading of the plan is the operative one, I agree that Ms. Gates would be entitled to benefits with respect to all of the claims that

were only -- for which she received less money than she would have under our reading of the plan. I think anyone else in the AB plan, I don't think it flows, I don't think your decision would do that because we still need to get a class certified, etc., with respect to injunctive relief. But I think from that decision would naturally flow the relief that the interpretation that has been used with respect to estimating, may not be used anymore, and that anyone else who has lost money because of that reading would be entitled to the difference.

With respect to the second claim, there is more of an issue because the defendants have said in the past -- and this was raised in *Lipstein* with respect to the court's decision, the New Jersey case that dealt with this also, that dealt with the class action motion -- that other plans may in fact have wording which would, because of the wording, not cause them to come within the decision that the plan here is unambiguous, that would require discovery to determine what the other plans say. As opposed to *Lipstein*, we would only be looking for plans which don't provide estimation, so the universe of plans is going to be less. I don't know how much less, I haven't had any discovery, but that would need to be done. We would need to see obviously whether a class could be certified. That issue is raised. All of those things would still need to be done with respect to the second claim.

Mr. Pappas went to the fourth -- let me only say, the third, fourth, and fifth claims, it is our position that it couldn't make the slightest bit of difference how your Honor rules on the plan interpretation as to whether or not the plaintiff is entitled to relief on the third, fourth, and fifth claims. If you say the defendants are right, they are interpreting the plan correctly, they are entitled to do it, the third, fourth, and fifth claims survive.

If the defendant's position -- the fourth claim is pled alternatively. It is either we are entitled to relief under 502(a)(3) or we are entitled to relief under 502(a)(2). Section 409 is not something which a fiduciary can violate. 409 simply is titled "Remedies for Breach of Fiduciary Duty." The defendant's argument that it applies only if the assets of the plan are involved, that is not correct.

THE COURT: So it is 409, not 1109?

MR. PREMINGER: 409 is 1109.

THE COURT: So that is labeled "Liability for Breach of Fiduciary Duty, not "Remedy," exactly the opposite.

MR. PREMINGER: I apologize. But it sets forth the remedies that are available in case of a breach of fiduciary duty. It does not set forth what the fiduciary duties are, so that 1109 in itself cannot be violated.

THE COURT: But it does appear from the language of the statute, which I have in front of me, that it does relate

to losses to the plan. It is really for somebody who is stealing money from the plan or engaged in some egregious investment strategy that caused losses to the plan in some way that violated their fiduciary duties because they want to put the money back in. That's what really 409 is most often used for.

MR. PREMINGER: Well, it is often used for that, yes, but it is not exclusively used for that.

THE COURT: Are you aware of any circuit case which has found that there is a 409 breach of fiduciary duty when there is no loss or diminution in assets of the plan, that the bank account isn't lower?

MR. PREMINGER: That there has been a breach of fiduciary duty?

THE COURT: Yes, a 409 breach of fiduciary duty.

MR. PREMINGER: There is no such thing as a 409 breach of fiduciary duty. There is only whether or not there is a claim -- Section 404 sets forth what the fiduciary duties are. They require fiduciaries to act solely on behalf of the participants and beneficiaries for the purpose of providing benefits, diversifying plan assets.

THE COURT: I understand that and I was not precise, but I think we are all thinking of 409 in terms of its wording, which is, I will quote, "shall be personally liable to make good to such plan any losses to the plan resulting from each

such breach." So the "each such breach," as I understand it, is a breach by a fiduciary, "fiduciary" defined under 404, but the "such breach" is something which caused the diminution in assets to the plan, right? There is a type of breach.

MR. PREMINGER: That's one --

THE COURT: He does X.

MR. PREMINGER: Yes.

THE COURT: He violates his breach.

MR. PREMINGER: Yes, but --

THE COURT: She can't get us both.

MR. PREMINGER: -- a remedy is also the termination of a fiduciary.

THE COURT: Yes, the last sentence of this says you can also remove the person, but it is for --

MR. PREMINGE: And you can also grant other appropriate equitable or remedial relief.

THE COURT: Hold on one second, because if we talk over each other it drives her crazy --

MR. PREMINGER: I'm sorry.

THE COURT: -- and when I read my transcript, it makes me look like I am in fourth grade.

So I understand that if there was someone who stole money from a plan or otherwise caused a diminution in assets of a plan, the world is the equitable oyster, right? The court can do all kinds of things. It can remove the trustee under

409, it can order such other equitable or remedial relief as the court deems appropriate, so if you didn't have the money, but you might get the money in the future, you can maybe put a lien on future assets, you can do all kinds of things. But it all seems to have to relate to a diminution in assets of the plan.

MR. PREMINGER: Well, I disagree. The Department of Labor, if you will look at its *amicus* brief in the Second Circuit, which was attached as an exhibit to our memo here, disagrees and the Department of Labor has regulatory authority over the fiduciary duty provisions of ERISA, and they explicitly disagreed that it relates only to plan assets. You have to be able --

THE COURT: But is there any case that you know, because if you had a case that would really help, like some sort --

MR. PREMINGER: Well, we have circuit court cases. I don't know if we cited a circuit court case. I know there was one case that we cited in which the court held that the failure of the plan to keep documents correctly was a breach of fiduciary duty which was actionable. The defendants had argued, well, there hasn't been any damage to the plan because of it. And the court said, You don't have to wait until there has been damage to the plan to cure a fiduciary breach. The whole purpose of getting the injunctive relief is to make sure

that there hasn't been, there won't be any damage to the plan.

And that's the point. Fiduciaries are required to fulfill their fiduciary duties, whatever they may be. United does not deny it is a fiduciary. Under the administrative services agreement with the plan, it specifically acknowledges its fiduciary duty status and states that it will process claims in accordance with ERISA and in accordance with the summary plan description. It has got to do that. Failure to do that is a breach of fiduciary duty. And what United is essentially arguing before this court is, yes, I have a fiduciary duty, but I can breach it whenever I want to blithely and there is no remedy for it. That cannot be the case. And if you will read the Department of Labor's *amicus* brief in the Second Circuit in this case, they make a lengthy argument that that cannot be the case.

Congress wanted there to be claims procedures. The legislative history, and if your Honor would like me to brief this, believe me, I can. Congress wanted there to be claims procedures so that -- and Mr. Pappas agreed with this -- there could be an expeditious and inexpensive method of resolving claims, so that there wouldn't be a great deal of litigation over them. If Mr. Pappas is correct that United cannot be required to fulfill its obligations to comply with the summary plan description here which sets forth the claims procedures and fiduciaries are required to comply with the plans, then

every time, as you have seen has happened in this case, Ms. Gates filed a claim and was not properly advised of how that claim was being decided, she would have to sue, every time, because they would never comply with the claims regulations. The whole purpose of the claims regulations is to try to get this resolved without somebody going to court.

THE COURT: Does she have any claims other than the two for the two providers? How many times did she -- I have just forgotten the number. How many --

MR. PREMINGER: Although many, the EOB's, I'm sorry, but the explanation of benefit forms deal with several different visits in each one. How many I cannot tell you off the top of my head.

THE COURT: What's the value of her total?

MR. PREMINGER: I have not even attempted to do it because it would require, at least in our view of the plan, it would require going to the Fair Health Network and figuring out what the CPT close is, what the value would be under the Fair Health Network, and deducting what Medicare actually would have paid. It is an exercise and I have chosen not to do it at this point in time simply because ERISA jurisdiction has no monetary limit. If in fact your Honor were to decide that we are correct as to how the plan should work, then I assume that I could get together with the defendants and work out exactly how the benefits are going to be calculated. But I have not at

this point in time calculated it.

THE COURT: Okay. How about, because we are going to run out of time soon, fifth, sixth, those claims. Is there anything in particular that?

MR. PREMINGER: Which ones?

THE COURT: Fifth and sixth.

MR. PREMINGER: The sixth is gone, so you are asking the third and the fifth?

Well, let me say something first with respect to something Mr. Giansello said. Standing is determined as of the time the complaint is filed. Ms. Gates had not yet been transferred to the indemnity plan at the time the complaint in this case was filed, so she had standing to pursue all of her claims. That does not go away simply because she was transferred to the indemnity plan.

THE COURT: I think the argument that he raised in his brief wasn't so much standing as mootness, that you can actually have standing at the outset, but then it can become moot, and that's where the article three standing runs into the mootness doctrine.

MR. PREMINGER: I understand that, but her claims are not moot. They haven't paid her what she said she is entitled to. She has a live claim.

THE COURT: So her claim as to injunctive relief may be moot, but that's different.

MR. PREMINGER: No.

THE COURT: I know you don't agree.

So the seventh claim for relief, are you arguing that some claim should be back in here because of the standing? What's the standing point going to?

MR. PREMINGER: Well, the standing for injunctive relief.

THE COURT: Okay.

MR. PREMINGER: Because that's -- Mr. Giansello did in fact raise it in his papers that she does not have standing to pursue an injunction.

THE COURT: I don't think it is a standing issue, but I think there is a serious question about whether or not there is prospective injunctive relief to which she is entitled. But that is not a standing issue.

MR. PREMINGER: That's not the issue as I understand the cases. I would --

THE COURT: We will figure that out. I understand the injunctive relief point, I think.

MR. PREMINGER: So on the third claim, which is the 503 claim, your Honor ruled in the first motion to dismiss decision that 503 applies only to plans. 503 says plans have to have claims procedures. Our section -- our third claim for relief simply seeks to require the plans to have a claims procedure which complies with ERISA and the regulations. The

claim does in fact state that because United, which is a fiduciary, hasn't complied with the claims procedures, that has perforce caused the plan not to have a compliant claims procedure, but the claim is not based on a plan's breach of fiduciary duty. A plan can't be a fiduciary.

THE COURT: So if Ms. Gates were to get relief under 503 for the third claim for herself, what steps are taken subsequent to the award of such relief? Does she go back and get some more procedure or does she -- is this solely representative?

MR. PREMINGER: It is prospective relief.

THE COURT: It is prospective.

MR. PREMINGER: It is prospective.

THE COURT: Is that prospective by statute?

MR. PREMINGER: There is nothing that can be done retroactively.

THE COURT: I guess I am saying we can't turn back the clock, but does she herself go back and get additional -- does she get to get another review by claims administrators?

MR. PREMINGER: That is not what we are seeking.

THE COURT: This is really for other folks.

MR. PREMINGER: It is herself for future claims.

THE COURT: But if one assumes that she is correctly in the indemnity plan --

MR. PREMINGER: The indemnity plan does the exact same

thing. United is the claims administrator for the indemnity plan also.

THE COURT: But does the indemnity plan, in your view, use the estimating methodology?

MR. PREMINGER: No. This injunction does not have to do with the estimating methodology. It only has to do with how they process claims, not how they -- not the ultimate decision on a claim. This claim has nothing to do with the coordination of benefits formula.

THE COURT: So, in your view, the third claim, the 503 relief, would go to every plan, then, that --

MR. PREMINGER: Every participant in the plan.

THE COURT: Every participant in any plan of AllianceBernstein.

MR. PREMINGER: That's correct.

THE COURT: So now I understand that claim. Okay.

We only have eight minutes left.

MR. PREMINGER: Then I better get to the fifth claim.

The fifth claim is a claim against AllianceBernstein which is both the plan sponsor and the plan administrator. And in its capacity as the plan administrator it is *per se* a fiduciary. In its capacity as a plan sponsor, which can appoint fiduciaries, the act of appointing fiduciaries is a fiduciary act. As a plan administrator -- and I don't know exactly how this happened, not having discovery, I don't know

whose decision it was to make United the claims administrator. If it was -- AB, AllianceBernstein, in its capacity as the plan sponsor, they were a fiduciary for those purposes, if it was AB in its capacity as plan administrator delegating its responsibilities for claims administration, that was a fiduciary act, which means that AllianceBernstein is a co-fiduciary with United, which makes it liable as a co-fiduciary for anything which it enabled United to do, or else it is a claim for failure to monitor.

Your Honor, in the first motion to dismiss decision, actually said that we had adequately pled that claim."With respect to her third cause of action, plaintiff has adequately pled a breach of fiduciary duty claim on AB's alleged failures to select, maintain, and monitor a competent claims administrator."

Again here, we are not seeking any monetary damages or retroactive relief. We are simply seeking injunctive relief to require AllianceBernstein to ride herd on any claims administrator it may appoint. Because especially if your Honor decides that we do not have a claim against United for its breach of fiduciary duty and failure to comply with claims procedure rules, the only way we have of ensuring compliance with those rules is by getting the relief against AllianceBernstein.

THE COURT: Are you aware of any other case, apart

from a construction of my first motion to dismiss decision, with a co-fiduciary, where there has been a co-fiduciary in this sense, derivative fiduciary in a way?

MR. PREMINGER: I am not sure what your Honor means by "derivative fiduciary."

THE COURT: Well, there does appear to be law which would suggest that AB is not in and of itself a fiduciary in so far it has contracted with UHIC to be the administrator; and so, to the extent that UHIC is an administrator and AB then has separate fiduciary duties to monitor the administrator, you call it a co-fiduciary, so it seems to become a co-fiduciary of some sort. Is this a new theory?

MR. PREMINGER: No. There is co-fiduciary liability under ERISA. There is a specific section. I believe it is 405. That discusses co-fiduciary liability and that a co-fiduciary is liable for acts of another fiduciary if it has failed to do something in its own right.

THE COURT: That's --

MR. PREMINGER: Which enables the fiduciary to breach.

THE COURT: That is a fiduciary to fiduciary in that one.

MR. PREMINGER: Yes.

THE COURT: I understand. I have read the briefing on this, and I will have to go back to it.

How about the sixth? Sixth is gone.

MR. PREMINGER: May I make one more point here?

THE COURT: Yes.

MR. PREMINGER: Mr. Giansello said that -- cited the *Flannigan* case from Connecticut for the proposition that the Supreme Court statement in *Bruch* about who is a participant is limited to receipt of documents. Well, *Bruch* did involve receipt of documents, but there is no such limitation. The question was, the issue in *Bruch* was who is a participant? Because the section of ERISA involved says a participant may receive certain documents. They simply had to decide who was a participant, and they decided that anyone with a colorable claim to a benefit is a participant. ERISA has only one definition of "participant." So if the Supreme Court has said anyone with a colorable claim to a benefit is a participant, that is what "participant" means regardless of what section of ERISA you are looking at.

Thank you.

THE COURT: Mr. Giansello, tell me your point that you were going to say before about how much --

MR. GIANSELLO: Well, I think you have to -- this is really down the line, but I think you have to look at the language of the indemnity plan. My point simply was that if he is right and if the court decides that he is right, that the plan is unambiguous and that there is no alternative admitting of a discretionary determination to use anything other than the

Medicare fee schedule on the Medicare side of the coordination of benefits calculation, the question is, what effect does that have as a matter of preclusion, if someone wants to raise it, on the indemnity plan? Where?

On the plan benefits side of the calculation, the language of the indemnity plan is very clear that that determination is to be made not by looking at fair and reasonable costs or some other standard, but by the Medicare payment arrangements. And if that should happen and if that were the consequence of a determination that Mr. Preminger is right, then he will have done harm not only to himself, but to everybody else who is a participant or beneficiary in the indemnity plan. So I think the court needs to tread carefully here with an eye toward the potential preclusive effect of any decision it makes.

THE COURT: All right. Mr. Preminger.

MR. PREMINGER: If I may respond. Mr. Giansello is correct that the language of the indemnity plan is different, but United, obviously with AllianceBernstein's concurrence, has consistently interpreted it the same way that they had interpreted the language of the copay plan. The language of the indemnity plan is not before this court. We have not challenged the interpretation that has been used for the indemnity plan.

THE COURT: I thought you were through your class

assertions.

MR. PREMINGER: No.

THE COURT: You are saying that all of the process injunctive relief --

MR. PREMINGER: With respect to the benefit claim, your Honor, what we are saying is we are looking at any plan that uses estimation when estimation is not provided for in the plan, and that countering United's interpretation would provide additional benefits for the class member. We are not looking to attack any interpretation of any plan that provides greater benefits to any participant. The indemnity plan, the language of the indemnity plan has always been interpreted according to United and AB as -- in exactly the same fashion as they have interpreted the copay plan.

THE COURT: Okay.

MR. PREMINGER: They cannot change that interpretation.

THE COURT: All right.

MR. PREMINGER: Unless they amend the plan.

THE COURT: I see how the issue is joined here I think. Okay.

Was there anything else, Mr. Pappas, that you had as a final couple of words?

MR. PAPPAS: If your Honor will give me 30 seconds.

THE COURT: Yes. Just don't talk too quickly. We

will be close, but it is important we get the record clear.

MR. PAPPAS: I heard Mr. Preminger say that the way his new Count Two differs from the identical count he asserted previously was that he understood the court's July 2012 order as dismissing the monetary claim asserted under 502(a)(3) and in fact the court's July 2012 order at page 22, footnote 10, makes very clear that the court dismissed "the equitable portion" of her first cause of action. That's exactly what he purports to be bringing now against United in Count Two; and therefore, your Honor, we think it is now clear that under the law of the case that claim should be dismissed.

I would again point the court to *Krauss v. Oxford* -- we have cited it many times -- *Nechis v. Oxford*. In both of those cases the Second Circuit held that the (a)(3) claim for claims procedure violations, whether it is a nondisclosure, an untimely action, or an improper processing of claims brought under 502(a)(3), had to be dismissed if the court found there were an appropriate or an adequate alternative remedy under 502(a)(1)(B). So those two cases, just to highlight, are dispositive. The court has already ruled to that effect, but Mr. Preminger said there are many cases allowing these types of injunctions. That's simply not the case, and not in the Second Circuit. He cited the Court to -- he didn't remember the name of the case saying that there was another circuit court case regarding failure to produce documents. That case he is

referring to, your Honor, is *Schaefer v. Operating Engineers* in the Ninth Circuit. He cited it. We distinguished it. That case very clearly related to documentation regarding the use of plan assets; therefore, it is very consistent with the court's reading of 409 and our reading of 409. And I think it is correct that at the moment there is no case holding, as Mr. Preminger says, a claim for under 409, for liability under 409, where there is anything but a claim that is related to the loss or misuse or mismanagement of plan assets.

Those are my only additional comments, your Honor.

MR. PREMINGER: May I briefly respond, your Honor, very briefly?

One, I may have misspoken with respect to your Honor's first motion to dismiss decision about the claim against United. I now recollect that in most part you had dismissed that claim. We had argued in opposition to dismissal, that United was a fiduciary, and you pointed out that the complaint did not state that United was a fiduciary. So our reading of your Honor's decision was we couldn't get anywhere with a monetary claim regardless of whether or not we alleged United was a fiduciary, but we thought we could get somewhere with a claim for injunctive relief alleging United was a fiduciary. So a substantial difference between the two complaints is the allegation of fiduciary status.

The other thing is that *Krauss/Nechis* do not deal with

this sort of situation. They are not class actions. They were not seeking relief from systemic violations of the claims procedure rules. They were seeking benefits because of the claims procedure -- a violation of the claims procedure rules, and that relief is not available. The relief was a remand.

Thank you.

THE COURT: All right. Thank you.

All right, everyone. I need to get you a decision in the relatively near future, but it is relative. It is relative to the queue. Because we don't have other dates in this case, we will put something down in early December so that we have a conference date. You all will, when you get the decision, figure out what to do with this date, but we will have something on the calendar so this just can't get buried. But let's come up with a date.

THE DEPUTY CLERK: Friday, December 5, at 12:30.

THE COURT: Does that work for you folks, the 5th at 12:30?

MR. GIANSELLO: It does for me.

THE COURT: Take a look at the order on this motion or series of motions.

MR. PREMINGER: Excuse me, your Honor, but I am going to be out of town Wednesday, Thursday and Friday of that week.

THE COURT: That's fine. There is no reason we can't make it the following week or the prior week.

THE DEPUTY CLERK: Friday, December 12, at noon.

THE COURT: Does that work?

MR. PREMINGER: That's fine with me, yes.

MR. GIANSELLO: Yes.

THE COURT: Mr. Pappas?

MR. PAPPAS: I believe so, your Honor, subject to checking my calendar, but I believe that works.

THE COURT: Okay. This has been helpful. Thank you very much. I am sorry if there were parts of things that you were going to talk about, Mr. Pappas in particular. I know you had all kinds of things that you didn't have a chance to say, but I think your briefing was very complete.

MR. PAPPAS: Thank you, your Honor.

THE COURT: Thanks.

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